to their sentencing statutes. See Don Stemen & Daniel F. Wilhelm, *Supreme Court Decision Focuses State Attention on Sentencing Regimes*, *in* State News 21-24 (Council of State Govt's, June/July 2005). The various proposals suggest that these States "seem to be favoring one particular proposition: the preservation of presumptive sentencing with the notable addition of fact-finding. This means asking juries—not judges—to find beyond a reasonable doubt the facts required to justify an aggravated sentence." *Id.* at 21-22. However, the States that have adopted this position have not done so because they believe it to be the best policy; rather, they have responded to what they perceive to be the rule of *Blakely*.

More broadly, in every State contemplating sentencing reform in response to *Blakely*, the scope of the Sixth Amendment jury-trial right is a crucial factor in designing the criminal sentencing framework. The benefits from consideration of offender characteristics may be less meaningful as the costs of conducting the necessary factual inquiry rise. Similarly, States may presume that courts, which have much broader experience than particular juries in observing criminal defendants at trial, at sentencing, and at probation revocation proceedings, are better positioned to assess offender characteristics such as likelihood of recidivism, potential for rehabilitation, or amenability to probation. If the Sixth Amendment requires that the assessment of such offender characteristics be committed to the jury rather than the court, some States may reasonably decide to abandon consideration of such characteristics, or abandon structured sentencing, altogether.

In short, the resolution of the question presented in Minnesota's petition will have a significant impact on the States' continuing assessments of their various sentencing frameworks.

II. The Decision Below Misapplies *Blakely* And Conflicts With This Court's Decisions Recognizing The Role Of Offender-Specific Facts In Sentencing.

The Court should grant Minnesota's petition because the decision below misapplies *Blakely* and erroneously invalidates a critical feature of Minnesota's structured sentencing regime.

Blakely establishes that a sentencing court operating in a structured sentencing regime may not increase a defendant's sentence beyond the presumptive sentence based on *offense-specific* facts that were not found by the jury or admitted by the defendant. See 542 U.S. at 303-305 (holding that the Sixth Amendment did not permit a sentencing court to depart upward from the standard range based on the court's own finding that the defendant acted with "deliberate cruelty"). *Blakely* does not suggest, however, that the same rule applies where the sentencing court departs from the presumptive sentence based on *offender-specific* facts such as likelihood of recidivism or amenability to probation. These facts do not relate in any way to the nature of "the crime the State *actually* seeks to punish." *Id.* at 307. Rather, they provide contextual information for the sentencing court to consider in assessing the "whole person and personality" of the defendant and the propriety of a particular sentence within a statutory framework. *Grayson*, 438 U.S. at 53.

Neither the text of the Sixth Amendment nor the historic understanding of the jury-trial right compels the conclusion that sentencing courts may not make their own findings of offender-specific facts. The Sixth Amendment guarantees a jury for criminal *prosecutions*, and governments prosecute criminal conduct, not offender characteristics. There is no sense in which a defendant's likelihood of recidivism or amenability to probation constitutes an element of the criminal offense, and to conflate such offender characteristics with elements of the offense is to erase any meaningful distinction between the conviction and the sentence. In this

case, the State seeks to punish the offense of first-degree test refusal, not "first-degree test-refusal by a person who is unamenable to probation."

This Court's decisions have long recognized the sentencing court's role in tailoring the sentence to the particular offender. As this Court noted in *Mistretta*, federal courts "[f]or almost a century" enjoyed "wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and for how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine." 488 U.S. at 363; accord *id.* at 364 (noting that "Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range"). In the exercise of this wide discretion, sentencing courts needed "the fullest information possible concerning the defendant's life and characteristics." *Williams*, 337 U.S. at 247. Since "[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence," *id.* at 248, the Court has observed that "[t]o an unspecified degree, the sentencing judge is obligated to make his decision on the basis, among others, of predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation," *Grayson*, 438 U.S. at 47-48 (footnote omitted). Thus, it has long been recognized that the sentencing court, within limits, may tailor a sentence to the particular defendant, taking account of facts that relate solely to that defendant's own personal history, personality, and character.

Properly understood in light of the text and this traditional understanding of the Sixth Amendment jury-trial guarantee, *Blakely* applies to upward departures based on facts related to the offense, not facts related solely to the offender. See generally Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277 (2005); Douglas A. Berman, *Conceptualizing* Blakely, 17 Fed. Sent. R. 89 (2004).

The decision below conflicts with this natural reading of *Blakely*, holding instead that *Blakely* forbids *any* departure from *any* aspect of a presumptive sentence based on *any* fact not found by the jury or admitted by the defendant.

Indeed, under the reasoning of the court below, the Sixth Amendment guarantees a criminal defendant a jury trial not only on the question of which laws he may have violated, but *also* on the question whether he would be a better candidate for prison or probation, and whether retribution or rehabilitation would be more appropriate in his case. The Sixth Amendment has never been understood to require so much, and this Court's decisions do not require such a sweeping result. *E.g., Almendarez-Torres* v. *United States*, 523 U.S. 224, 243 (1998) (noting that likelihood of recidivism is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"); *Grayson*, 438 U.S. at 55 (reaffirming the authority of the sentencing court to assess the defendant's "prospects for rehabilitation and restoration to a useful place in society").[2]

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[2] Respondent's argument that *Apprendi* itself involved a sentence enhancement based on an offender characteristic misses the mark. See Opp'n at 5. At issue in *Apprendi* was a hate-crimes statute that authorized a sentence enhancement if the defendant "in committing the crime" acted with animus toward groups or individuals with specified characteristics. *Apprendi* v. *New Jersey*, 530 U.S. 466, 468-469 (2000). By its own terms, that statute focused on the defendant's motive for committing the particular offense, not offender characteristics that exist separate and apart from the particular offense.

III. The Decision Below, While Consistent With A Recent Ninth Circuit Decision, Conflicts With Decisions From The Highest Courts Of Other States And Illustrates Broader Disagreement On The Impact Of *Blakely*.

Not only does the decision below conflict with the most natural reading of *Blakely*, but it also conflicts with the decisions of the highest courts of other States.

1. The decision below squarely conflicts with the decision of the Supreme Court of Hawaii in *State* v. *Kaua*, 72 P.3d 473 (Haw. 2003). The defendant in *Kaua* challenged his sentence on the ground that he was sentenced as a "multiple offender" based on a finding by the sentencing court, not the jury, that an extended term was "necessary for protection of the public."[3] The court rejected this argument, holding that *Apprendi* does not require jury factfinding on issues that are "extrinsic" to the conviction. *Id.* at 485. Whereas the Supreme Court of Hawaii distinguishes "extrinsic" offender characteristics from offense-related facts that are "intrinsic" to the crime of conviction, the court below treats all facts the same under *Apprendi* and *Blakely*.

The conflict on this issue is even more stark given the Ninth Circuit's recent decision affirming a judgment granting habeas relief to Kaua on the ground that *Apprendi* forecloses any distinction between "intrinsic" and "extrinsic" facts in sentencing. See *Kaua* v. *Frank*, 436 F.3d 1057, 1060-1062 (9th Cir. 2006). According to the Ninth Circuit, "a jury should have made the public protection finding." *Id.* at 1062. That of course is consistent with the decision below in this case, but flatly contrary to the Hawaii Supreme Court's approach.

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[3] Under Hawaii's sentencing regime, a defendant is subject to an extended sentence if the defendant "is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public." 72 P.3d at 475 n.1. Kaua admitted that he was a multiple offender. *Id.* at 476.

2. As Respondent acknowledges, the decision below also conflicts with the decision of the Supreme Court of Kansas in *State* v. *Carr*, 53 P.3d 843 (Kan. 2002), concerning the application of *Apprendi* to dispositional departures. Whereas the court below held that *Apprendi* and *Blakely* bar *any* upward departures from the presumptive sentence based on judicial findings, see 706 N.W.2d at 46, the court in *Carr* held that "*Apprendi* applies only to upward durational departures," not dispositional departures, 53 P.3d at 850. According to *Carr*, because "[p]robation and parole are dispositions alternate to the serving of a sentence, and neither probation nor parole increase[s] nor decrease[s] the sentence required to be imposed by the statute," a dispositional departure does not implicate the jury trial right described by *Apprendi*. *Ibid.* Although the distinction between dispositional and durational departures is not raised in the question presented, this conflict illustrates the need for clarification of the scope of *Apprendi* and *Blakely* in structured sentencing regimes.

3. More generally, state courts are also divided on *Blakely's* impact on structured sentencing. In addition to the court below, the highest courts of Arizona, Colorado, Indiana, New Jersey, North Carolina, Oregon, and Washington have held that *Blakely* applies to *any* upward departure from a presumptive sentence based on aggravating factors found by the sentencing court. See *State* v. *Brown*, 99 P.3d 15, 17-18 (Ariz. 2004); *Lopez* v. *People*, 113 P.3d 713, 726 (Colo. 2005); *Smylie* v. *State*, 823 N.E.2d 679, 683-684 (Ind. 2005); *State* v. *Natale*, 878 A.2d 724, 737-739 (N.J. 2005); *State* v. *Allen*, 615 S.E.2d 256, 264-266 (N.C. 2005); *State* v. *Dilts*, 103 P.3d 95, 98-99 (Or. 2004); *State* v. *Hughes*, 110 P.3d 192, 201-204 (Wash. 2005). Specifically, the Supreme Court of Washington has held that *Blakely* forbids a sentencing court to depart from a presumptive sentence based on offender-specific findings that the defendant lacked remorse, held a disregard for the law, and likely would not benefit from rehabilitation. *Hughes*, 110 P.3d at 202-204.

By contrast, the highest courts of California and Tennessee have held that judge-found facts may support upward departures from a presumptive sentence where the court retains discretion within the sentencing regime to set a sentence within the statutory range. See *People* v. *Black*, 113 P.3d 534, 545-548 (Cal. 2005); *State* v. *Gomez*, 163 S.W.3d 632, 658-662 (Tenn. 2005). According to the Supreme Court of California, "*Apprendi*, *Blakely*, and *Booker* all make clear that judicial factfinding is acceptable in the context of a discretionary sentencing decision." *Black*, 113 P.3d at 547.[4]

These conflicts are intolerable given that thousands of criminal defendants are sentenced every day throughout the States and that the validity of their sentences may depend upon the proper interpretation of *Blakely*. Just as *Booker*-based challenges have flooded the federal courts of appeals, *Blakely*-based challenges have flooded state appellate courts. The conflicts among state courts about the scope of the jury-trial right in structured sentencing regimes generally, and with respect to offender characteristics specifically, likely will not be resolved absent a definitive ruling from this Court. The conflicts on these issues are unlikely to abate and therefore ripe for ultimate resolution by this Court.

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The States bear the primary responsibility for fashioning criminal sentencing procedures, and fashioning such procedures is complicated work. Just as there are various philosophical approaches to punishment, the States have adopted various frameworks for criminal sentencing. This

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[4] The Court will consider application of *Blakely* to California's sentencing regime in *Cunningham* v. *California*, No. 05-6551. Given that California's sentencing regime, like Minnesota's, authorizes the sentencing court to increase a sentence based on its own findings of identified factors, the decision in *Cunningham* might influence the resolution of this case. But it is unlikely to be dispositive.

diversity is useful, for one State's experiment with determinate (or indeterminate) sentencing may uncover particular practical flaws that lead to improvements in other States. See *Blakely*, 542 U.S. at 327 (Kennedy, J., dissenting) (noting "the interest of the States to serve as laboratories for innovation and experiment"). As they experiment with different approaches, however, the States must know the contours of applicable Sixth Amendment limitations, especially with respect to basic issues such as the role of offender characteristics. By granting Minnesota's petition and deciding this case, the Court can provide the needed certainty.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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